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IN THE

Supreme Court of the United States

October Term, 1965

PAUL R. SCREVANE, President of the City Council of the City of New York, and JAMES POWER and MAURICE J. O'ROURKE, Commissioners, Board of Elections, New York City,

Appellants,

—against—

JOHN P. LOMENZO, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, EUGENE H. NICKERSON, County Executive, Nassau County, FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, and JOHN R. CREWS and THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Defendants-Appellees,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,

Defendants-Intervenors-Appellees,

and

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY,

Plaintiffs-Appellees,

and

ANTHONY J. TRAVIA and JOSEPH ZARETZKI,

Plaintiffs-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	3
Questions Presented	4
Statement of the Case	7
The Substantiality of the Questions Presented	10
Conclusion	17
Appendix A—May 24, 1965 Order of District Court	1a
Appendix B—Oral Opinions of District Court, May 10, 1965	3a
Appendix C—Oral Opinions of District Court, May 24, 1965	12a
Appendix D—July 13, 1965 Order of District Court	27a
Appendix E—Oral Opinions of District Court, July 13, 1965	31a
Appendix F—Order of New York Court of Appeals	37a
Appendix G—Opinions of New York Court of Appeals	40a

Authorities Cited

Cases

Carrington v. Rash, 380 U.S. 89 (1965)	14
Clothing Workers v. Richman Bros., 348 U.S. 511 (1955)	16
Fortson v. Dorsey, 379 U.S. 433 (1965)	16
Glinski v. Lomenzo (N.Y. Ct. of Appeals, July 9, 1965)	2, 10
Hughes v. WMCA, 379 U.S. 694 (1965)	4, 7, 11

PAGE

Lassiter v. Northampton Bd., 360 U.S. 45 (1959) 14
Leiter Minerals v. United States, 352 U.S. 220 (1957) 15, 16
Matter of Orans, 45 Misc 2d 616 (S. Ct. N.Y.), *aff'd*, 15 NY 2d 339 (April 14, 1965), *appeal pending*, Oct. T. 1965, No. 319 ..... 2, 5, 7, 12, 14
Pope v. Williams, 193 U.S. 621 (1904) 14
Reynolds v. Sims, 377 U.S. 533 (1964) 4, 14, 16
Scott v. Germano, — U.S. —, 14 L ed 2d 477 (June 1, 1965) 11
Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944) 15
Travia v. Lomenzo (Oct. T. 1965, No. 191), — U.S. —, 14 L ed 2d 480 ..... 2, 9
WMCA v. Lomenzo, 377 U.S. 633 (1964) 3, 4, 5, 7, 8, 14

Statutes and Constitutions

Fourteenth Amendment 3, 6, 7, 16
New York Constitution, Article III, Sections 2-5 .... 3, 5, 7, 12, 14
New York Constitution, Article XIX, Section 2 12
N.Y. Election Law, Section 18 11
N.Y. Laws of 1964, Chapter 976 ..... 4, 5, 6, 9
N.Y. Laws of 1964, Chapters 976-979, 981 7
N.Y. Laws of 1965, Chapter 371 (Ass. Int. 5695, Pr. 5988) 8, 9
N.Y. Laws of 1965, Chapter 412 11
N.Y. State Law, Section 121 3
N.Y. State Law, Section 123 3
28 U.S.C. 1253 4
28 U.S.C. 1343 3
28 U.S.C. 2201 3
28 U.S.C. 2202 3
28 U.S.C. 2283 ..... 15, 16
42 U.S.C. 1983 3
42 U.S.C. 1988 3

IN THE

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October Term, 1965

No. .....

PAUL R. SCREVANE, President of the City Council of the City of New York, and JAMES POWER and MAURICE J. O'ROURKE, Commissioners, Board of Elections, New York City,

Appellants,

—against—

JOHN P. LOMENZO, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, EUGENE H. NICKERSON, County Executive, Nassau County, FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, and JOHN R. CREWS and THOMAS MALLEE, Commissioners, Board of Elections, New York City,

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Plaintiffs-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Opinions Below

The order appealed from and the majority and dissenting opinions of the three-judge District Court below are not

reported. The order is annexed as Appendix A; the majority and dissenting oral opinions rendered on May 10, 1965, are annexed as Appendix B; the majority and dissenting oral opinions rendered on May 24, 1965, are annexed as Appendix C.

On June 1, 1965, the motion of plaintiffs-intervenors Travia and Zaretzki to accelerate their companion appeal from the May 24 order (Oct. T. 1965, No. 191) was denied, along with their application for a stay pending appeal. *Travia* v. *Lomenzo*, — U.S. —, 14 L ed 2d 480. Reapplication for such stay was denied on July 16, 1965.

On July 16, 1965 the application of plaintiffs-intervenors Travia and Zaretzki and the instant appellants, jointly, for a stay pending appeal from the July 13, 1965 order of the District Court was denied. (A copy of this order is annexed as Appendix D, and the District Court's oral opinion as Appendix E.) This appeal has not yet been docketed.

Related opinions of the New York State courts are *Matter of Orans*, 45 Misc 2d 616 (S. Ct. N.Y.), *aff'd*, 15 NY 2d 339 (April 14, 1965), *appeal pending*, Oct. T. 1965, No. 319, and *Glinski* v. *Lomenzo*, decided by the New York Court of Appeals on July 9, 1965. (A copy of the order of the Court of Appeals in *Glinski* v. *Lomenzo* is annexed as Appendix F, and a copy of its opinion annexed as Appendix G.)

Also pending are appeals by defendants Lomenzo, *et al.* (Oct. T. 1965, No. 81), and plaintiffs WMCA, *et al.*, defendant Nickerson and the instant appellants, jointly (Oct. T. 1965, No. 85), each appealing from a portion of the

January 26, 1965 order of the District Court, which stated that of the four apportionment plans enacted by the New York legislature in December, 1964, Plan A complies, and Plans B, C and D do not comply, with the Fourteenth Amendment.

The opinion of the District Court on which its January 26, 1965 order is based is reported in 238 F. Supp. 916. Its prior opinions are reported in 208 F. Supp. 368, 202 F. Supp. 741 and 196 F. Supp. 758. Prior opinions of this Court are reported in 379 U.S. 694, 377 U.S. 633 and 370 U.S. 190.

Jurisdiction

This proceeding was originally brought in 1961 under the Civil Rights Act, 42 U.S.C. §§1983, 1988 and 28 U.S.C. §1343, and 28 U.S.C. §§ 2201, 2202, to declare invalid under the Fourteenth Amendment the apportionment provisions of the New York Constitution (Article III, §§2-5) and the statute enacting an apportionment pursuant thereto (N.Y. STATE LAW §§121 and 123); and to restrain state officials from conducting an election thereunder. The complaint further prays that the District Court retain jurisdiction until such time as the Legislature, "freed from the fetters imposed by the Constitutional provisions invalidated by this Court, provides for such apportionment of the State legislature" as will insure plaintiffs the rights guaranteed them under the Constitution. Transcript of Record, *WMCA* v. *Lomenzo*, Oct. T. 1963, No. 20, pp. 11-12.

In *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964), this Court held that the New York apportionment did violate the Fourteenth Amendment, and remanded to the District

Court for further proceedings consistent with the views stated in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), wherein this Court stated that the lower courts should attempt "insofar as possible" to accommodate the relief ordered to the apportionment provisions of the State's constitution. *Id.* at 584.

Appellants hereby appeal from a subsequent order by two judges of the three-judge panel, entered on May 24, 1965. It requires that an election of the New York Legislature be held in 1965, a date which contravenes the New York State constitution, on the basis of a legislative apportionment contained in a statute which the New York Court of Appeals on April 14, 1965 held invalid because it contravenes the New York State constitution.

Appellants' notice of appeal was filed with the clerk of the District Court on May 26, 1965.

Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §1253. The following cases, among others, sustain jurisdiction: *Hughes* v. *WMCA,* 379 U.S. 694 (1965); *WMCA* v. *Lomenzo,* 377 U.S. 633 (1964).

Questions Presented

The following questions presented by this appeal are also presented by the pending appeal in No. 191:

1. Did the District Court err in ordering the State of New York to hold an election of members of the New York State Legislature on November 2, 1965, on the basis of the provisions of Chapter 976 of the Laws of 1964 of the State of New York, which statute was held to contravene

the Constitution of the State of New York by the New York Court of Appeals in *Matter of Orans,* 15 NY 2d 339 (decided April 14, 1965)?

2. Did the District Court err in ordering that said election be held for an Assembly consisting of 165 members notwithstanding the fact that in *Matter of Orans, supra,* the New York Court of Appeals held, in the light of this Court's decision in *WMCA* v. *Lomenzo,* 377 U.S. 633, that Article III §2 of the Constitution of the State of New York continues to require that the Assembly consist of 150 members?

3. Did the District Court err in ordering that said election be held, notwithstanding the fact that the judgment of the trial court in *Matter of Orans, supra,* reported at 45 Misc 2d 616, held that Chapter 976 of the Laws of 1964 violates *prima facie* numerous rules contained in Article III §§ 4 and 5 of the State constitution relating to the drawing of district lines, including the rules that each senate district shall be in as compact form as practicable, and that each assembly district shall consist of convenient territory and shall be in as compact form as practicable?

4. In the light of circumstances which developed since February 1, 1965, did the District Court err in refusing to vacate its order of July 27, 1964 insofar as it directed that the terms of the members of the New York Legislature elected on November 3, 1964, or any special election subsequent thereto, shall expire on December 31, 1965, rather than on December 31, 1966, as required by the constitution of the State of New York?

5. Did the District Court err in refusing to order that during the year 1966 the members of the New York Legislature should vote by a system of weighted voting under a formula described by Judge Richard H. Levet in his oral opinion rendered herein on May 10, 1965?

The following questions presented by this appeal are also presented by the pending appeal in No. 85:

6. Did the District Court err in not considering or passing upon the question whether political gerrymandering can violate the Fourteenth Amendment of the United States Constitution?

7. Did the District Court err in not admitting proof or hearing argument that Chapter 976 of the Laws of 1964 is invalid as violative of the Fourteenth Amendment of the United States Constitution in that:

(a) it establishes districts which are not convenient and compact and which depart in a substantial and unreasonable manner from natural geographic and political subdivision boundaries; and

(b) district lines were deliberately designed to, and were adopted in such a manner as to, and do in fact systematically minimize the voting power of some persons in the state and unduly increase and maximize the voting power of other persons in the state?

8. Did the District Court err in not declaring that Chapter 976 of the Laws of 1964 is invalid as a violation of the Fourteenth Amendment of the United States Constitution?

Statement of the Case

After this Court held in *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964), that the apportionment of the New York legislature violated the Fourteenth Amendment, the District Court on July 27, 1964 ordered that the term of the Legislature to be elected in 1964 be limited to one year, instead of the two-year term provided by state law. On appeal this Court affirmed, Justices HARLAN and CLARK dissenting. *Hughes* v. *WMCA*, 379 U.S. 694 (1965). Justices WHITE and GOLDBERG joined the affirmance:

> "since it is their understanding that it in no way interferes with the power of the District Court in the light of circumstances that may develop, to vacate or otherwise modify its order requiring an election in the fall of 1965."
>
> *id.* at 694.

The following circumstances developed since this affirmance:

(a) On March 15, 1965, the New York Supreme Court decided *Matter of Orans*, 45 Misc 2d 616, holding invalid all four apportionment plans contained in the Reapportionment Compliance Act (N.Y. LAWS 1964, Ch. 976, 977, 978, 979 and 981) on the ground that each plan provided for an Assembly of more than 150 members, in violation of Article III §2 of the State constitution, and that the assembly apportionment thus being invalid, the apportionment of the Senate necessarily falls with it (45 Misc 2d at 630-38). The court also held that the districting rules of the State constitution (Article III §§ 4, 5) are valid and subsisting and survive the condemnation of this Court's ruling in *WMCA*

v. *Lomenzo*, and that petitioner had proved *prima facie* that many districts in the Senate and Assembly violated one or more of the districting rules (*id.* at 638-55).

(b) On March 24, 1965 the order of the New York Supreme Court was filed. It adjudged the Reapportionment Compliance Act to be invalid and in violation of the State constitution. It retained jurisdiction:

> "for the purpose of entertaining such applications and conducting such further proceedings as any party may request or as may be appropriate in the light of further proceedings in these proceedings or in *WMCA, Inc.* v. *Lomenzo*, including (but without limitation) applications for injunctive or other relief as may be appropriate to give effect to this judgment * * *."

(c) On April 14, 1965, the New York Court of Appeals affirmed: "We hold to be in full effect the flat, positive and unmistakable command of the State Constitution that there be 150 members of the State Assembly. Since each of the four plans violates that command, each plan and all five statutes are invalid." 15 NY 2d at 345. The Court of Appeals expressly did not consider the lower court's determination concerning violations of the districting rules. See 15 NY 2d at 353-54.

(d) On May 12, 1965, the Legislature passed a bill (Ass. Int. 5695, Pr. 5988) providing for submission to the electors at the 1965 general election of the question "shall there be a convention to revise the constitution and amend the same?" pursuant to Article XIX §2 of the State constitution, and regulating the nomination and election of delegates if such question be decided in the affirmative. (This

bill became law [N.Y. Laws 1965, Ch. 371] when signed by the Governor on June 14, 1965.)

(e) On May 19, 1965 both houses of the Legislature adopted a resolution (Resolution No. 184) adopting, as the sense of the body, a program for temporary and permanent legislative apportionment, including (a) establishment of a bi-partisan commission to prepare a permanent reapportionment of the Legislature for the 1966 election on a non-political and constitutional basis; and (b) as a temporary measure, in lieu of the 1965 election mandated by the District Court's order of July 27, 1964, to provide for weighted voting during the 1966 legislative session by each member of the Legislature elected in November, 1964. A copy of this resolution is annexed as Appendix E to the Jurisdictional Statement in *Travia* v. *Lomenzo*, Oct. T. 1965, No. 191.

(f) On May 24, 1965, in accordance with the concurrent resolution of May 19, the Legislature adopted two bills: Ass. Int. 6050, Pr. 7066, establishing the bi-partisan reapportionment commission, and Ass. Int. 6051, Pr. 7067, adopting the weighted voting formula. (Both bills were vetoed by the Governor on May 27, 1965.) See Appendices F and H to the Jurisdictional Statement in *Travia* v. *Lomenzo, supra.*

Notwithstanding the invalidation of the apportionment plans enacted by the 1964 Legislature and the positive steps taken by the 1965 Legislature thereafter, the District Court, on May 24, 1965, entered the order here on appeal. It requires a 1965 election on the basis of Plan A, the apportionment plan contained in Chapter 976 of the Laws of 1964, one of the five statutes which the Court of Appeals held invalid as in violation of the State constitution.

Thereafter, on June 22, 1965 citizens of New York State brought a proceeding in the State courts (*Glinski v. Lomenzo*), which culminated in an order of the Court of Appeals dated July 9, 1965 enjoining the holding of a 1965 election on the basis of Plan A. See Appendices F and G. Finally, on July 13, 1965 the District Court entered a further order, reaffirming its order of May 24. See Appendix D.

The Substantiality of the Questions Presented

This appeal concerns the scope of the discretion of a federal court to fashion interim relief in a state apportionment case. Two central problems are presented:

(a) Whether it is within the discretion of a federal court to order a state election to proceed at a time and under an apportionment plan which the highest State court has held to violate the State constitution in respects not claimed to be violative of the Federal Constitution, when a number of more reasonable alternatives are available; and

(b) Whether it is within the discretion of a federal court to order a state election to proceed under an apportionment plan which is claimed to violate the Federal Constitution as a political gerrymander, without considering the evidence offered to support the claim.

The controversy has inevitable partisan overtones. In the 1964 election the Democratic Party unexpectedly gained control of both houses of the malapportioned State legislature for the first time since 1934. Its interests might have been served by elimination of the District Court's requirement for a 1965 election. Similarly, the interests of the Republican Party may be served by a 1965 election using

Plan A, it being one of the four alternative apportionment plans enacted at the "lame duck" session of the previous Republican-controlled Legislature, held in December, 1964.

(a)

The alternatives available to the District Court were reasonable and would have avoided the unseemly confrontation of federal and state power which its May 24 order has produced. *Cf. Scott* v. *Germano,* — U.S. —, 14 L ed 2d 477 (June 1, 1965).

The District Court should have modified its July 27, 1964 order to eliminate the requirement that an election be held in 1965, in the light of the circumstances that developed following this Court's affirmance of that order in *Hughes* v. *WMCA, supra.*

The circumstances that did develop certainly justified this course. The District Court previously had declared that three of the four apportionment plans enacted by the 1964 Legislature were invalid under federal law, without passing on their validity under state law. The New York Court of Appeals then held all four plans invalid as violative of a State constitutional provision which was not affected by this Court's "one man-one vote" rule. The Court of Appeals rendered its decision on April 14, 1965, less than two months before New York's election machinery was required to start functioning—June 1, the last day to notify boards of elections on positions. See N.Y. ELECTION LAW §18.*

Following the Court of Appeals' decision and before the District Court acted on May 24, the State legislature had taken substantial steps to afford both interim and permanent relief.

---

* N.Y. LAWS 1965, Ch. 412, approved by the Governor on June 21, 1965, extended this date to June 22.

On May 12 it passed a bill to place in the ballot at the 1965 election the referendum on holding a constitutional convention, the necessary first step to hold such a convention under the procedure required by the State constitution (Art. XIX § 2). If the vote is "yes" on the referendum, the convention will be empowered to adopt an apportionment plan which, if approved by the voters, will go into effect at the 1968 election.

On May 19 the Legislature adopted a concurrent resolution expressing its support for a proposed reapportionment program, and on May 24 it passed two bills to implement this program. One established a bi-partisan reapportionment commission to prepare a non-political apportionment conforming to state and federal law for adoption by the Legislature to take effect at the 1966 election. The other adopted as an interim measure a method of weighted voting to govern the 1966 session of the existing malapportioned Legislature.

As a second alternative, the District Court could have directed that the 1965 election be held, but using the existing apportionment plan and requiring that the members of the Legislature so elected vote by a weighted voting formula during their one-year term. This was the proposal of the district judge who dissented from the May 24 order.

As a final alternative, the District Court could have appointed a special master to prepare a plan conforming to state and federal law, to be used for an election in 1965. This was the solution first urged by plaintiffs at a hearing on March 22, 1965, following the lower court's decision in *Matter of Orans, supra.*

The District Court rejected all the alternatives proposed. It refused to eliminate the requirement of a 1965 election. At the May 24 hearing it noted that by May 10 the Legislature "had not even approached enactment of another apportionment scheme" (Appendix C, p. 15a, *infra*) and stated: "We are loathe to reward the present members of the Legislature for their inaction by granting them another year in office, even under a scheme of weighted voting." *Id.* p. 16a.

It refused to appoint a special master:

> "* * * We can hardly conceive of a greater interference with the process of self-government than for us, a three-judge United States District Court, to impose on the citizens of New York State, a districting plan which has never been enacted by their own elected representatives. Such a course of action should be saved only for circumstances in which there is no viable alternative."
>
> (*id.* p. 17a)

And it rejected holding the 1965 election under the existing apportionment, but using weighted voting. It surmized that weighted voting violated the New York constitution (*id.* pp. 18a, 19a) and found objectionable the fact that weighted voting "would produce a disparity in voting power of 21:1 between Assemblymen from the largest and smallest districts" (*id.* p. 18a).

The order of May 24, 1965 has compelled the state authorities to act in a manner which violates the New York constitution, with respect to matters which in no way conflict with overriding federal policy. The time, place and manner of holding an election of a state legislature is ex-

clusively within the power of a state to regulate, so long as such regulation is on a non-discriminatory basis. *Pope* v. *Williams*, 193 U.S. 621 (1904); *see Carrington* v. *Rash*, 380 U.S. 89, 91 (1965); *Lassiter* v. *Northampton Bd.*, 360 U.S. 45, 50-51 (1959). The District Court itself stated that legislative apportionment is "a matter of the utmost sensitivity and importance to the people of the State of New York." 238 F. Supp. at 922. This Court expressly recognized that "A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." *Reynolds* v. *Sims*, 377 U.S. at 578. Its opinion in *WMCA* v. *Lomenzo* discusses in detail the rules in the New York constitution (Art. III §§4, 5) which prescribe for the Legislature the method of drawing district lines, including a requirement that districts be compact and contiguous. See 377 U.S. at 646-47.

Yet the apportionment plan which the District Court has compelled New York to adopt not only violates the State constitution with respect to the size of the Assembly and doubtless the Senate also, *see Matter of Orans*, 15 NY 2d at 351, but also violates on a wholesale basis its salutary anti-gerrymandering rules for drawing district lines. See *Matter of Orans*, 45 Misc 2d at 638-55.

Among other things, Plan A does not comply with the rules for balancing the populations of adjoining districts within a county. As a result, the District Court in effectuating this Court's "one man-one vote" rule has mandated districts of less equal population than those required by state law.

And under the circumstances, including the Legislature's action adopting a weighted voting formula to govern the 1966 legislative session, the District Court's mandate that an election be held in 1965, in violation of the State constitution, is a clear abuse of discretion.

The 1965 election is unnecessary on federal grounds. The interest of plaintiffs in obtaining immediate relief from the present malapportionment would have been fully served by the weighted voting procedure the Legislature adopted.

The District Court's stated desire not "to reward" the Legislature for failing to enact a new apportionment during the time elapsed from April 14 to May 24 furnishes no proper basis for directing an election expressly violative of State constitutional provisions. Moreover, the Legislature's inability to enact a new apportionment in the limited time available did not warrant such "punishment."

The District Court's doubts about the status of weighted voting under the New York constitution are an inadequate basis for rejecting the Legislature's proposal: "we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). And such doubts are apparently unfounded. In *Glinski* v. *Lomenzo, supra*, three judges of the New York Court of Appeals expressly endorsed weighted voting as a temporary measure to comply with the requirements of the Federal Constitution, and the remaining judges expressed no opposition to it. See p. 40a, *infra*.

Any power of the District Court to act as it did must derive from 28 U.S.C. § 2283, a statute "designed to prevent conflict between federal and state courts." *Leiter*

Minerals v. *United States*, 352 U.S. 220, 225 (1957); see *Clothing Workers* v. *Richman Bros.*, 348 U.S. 511 (1955).

In *Reynolds* v. *Sims*, this Court gave an explicit direction to lower courts in fashioning relief from malapportionment:

> "Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of the state constitutions insofar as possible."
>
> *Reynolds* v. *Sims*, 377 U.S. at 584.

It is submitted that the District Court's May 24 order plainly violates this Court's direction. To the extent that it enjoins state court proceedings, it equally plainly constitutes an abuse of the power conferred by 28 U.S.C. §2283.

(b)

The questions as to whether an apportionment plan based primarily on political gerrymandering can under certain circumstances violate the Fourteenth Amendment are clearly substantial. Gerrymandering, like malapportionment, is capable of producing an apportionment scheme which "would operate to minimize or cancel out the voting strength of * * * political elements of the voting population." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965). The District Court plainly erred when it ruled that the Equal Protection Clause extends only to instances of racial gerrymandering, and therefore refused even to consider the proof offered that Plan A was designed to minimize the voting strength of political elements of the voting population. See 238 F. Supp. at 925-26.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted, the order appealed from should be vacated, and the cause remanded.

New York, N.Y.
August 3, 1965

Respectfully submitted,

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APPENDIX A

May 24, 1965 Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civil 1559

WMCA, INC., et al.,

Plaintiffs,

—against—

JOHN P. LOMENZO, Secretary of State of the State of New York, et al.,

Defendants.

Before:

HON. STERRY R. WATERMAN,

Circuit Judge.

HON. SYLVESTER J. RYAN,
HON. RICHARD H. LEVET,

District Judges.

Upon the Notice of Application of the Attorney General of the State of New York, dated April 19, 1965, for such further order in this action as may be deemed necessary or appropriate by the Court for the implementation of its orders of July 27, 1964 and of January 26, 1965, as resettled by its order of February 16, 1965, and upon the proceedings in open court on May 10, 1965, and all papers submitted with respect to said hearing,

Appendix A—May 24, 1965 Order of District Court

IT IS HEREBY ORDERED THAT:

1. An election of members of the New York State Legislature shall be held on November 2, 1965, provided that the terms of the members so elected on that date or at any special election to fill vacancies, shall expire on December 31, 1966.

2. Though the purported statute is itself presently ineffective, the scheme set forth in the Reapportionment Compliance Act, Chapter 976 of the Laws of 1964, together with such clerical corrections as have been certified to us by the Secretary of State pursuant to our order of May 10, 1965, in accord with the procedures set forth in §403 of said ineffective Act, shall form the basis for the election of members of the New York State Legislature at the general election on November 2, 1965 and for any primary contest to nominate candidates for the Legislature or for any special election to fill vacancies prior to December 31, 1966. There is attached hereto and made a part hereof copies of the Act and the certified clerical corrections.

3. Jurisdiction of further proceedings which may be found to be necessary in this Court is retained.

Dated: New York, New York
May 24, 1965

/s/ STERRY R. WATERMAN
U. S. Circuit Judge

/s/ SYLVESTER J. RYAN
U. S. District Judge

.....
U. S. District Judge

APPENDIX B

Oral Opinions of District Court, May 10, 1965

Judge Waterman: Anyone wish to say anything further? This was the arrangement we had, that he would end, but he may have said something that someone else wishes to comment on.

(No response.)

Judge Waterman: All right, gentlemen.

The Court has made up its mind, as I think you know.

Back on July 27th we permitted a mal-apportioned Legislature to be elected on a mal-apportioned base and a mal-apportioned Legislature to meet in special session. This would almost seem to be the limit, that one would expect this Court to permit a mal-apportioned Legislature to attempt legislation in this state.

We said back in July that the mal-apportioned Legislature which we were permitting to be elected would have a term which would expire on December 31, 1965, and we provided that not later than April 1st of this year the legislature shall have enacted into law a valid apportionment scheme that is in compliance with the Fourteenth Amendment of the United States Constitution and which shall be implemented so as to effect the election of members to the Legislature at the election in November, 1965, members so elected to hold office for a term of one year, ending December 31, 1966.

Then, at a subsequent hearing, as you all know, we extended the time within which that order could be complied with until May 5th, which was five days ago.

Appendix B—Oral Opinions of District Court, May 10, 1965

Now in the meantime a legislature did pass an act which we have held did and does comply with the Fourteenth Amendment of the United States Constitution, and a subsequent mal-apportioned Legislature has had since the date of its convening early in January until to date an opportunity to replace what the mal-apportioned Legislature of December of 1964 did, and thus far has accomplished nothing, in spite of the extension of time which we granted from April 1st to May 5th, and a further extension of time in fact until today.

All three of us are of the opinion that there is no point in any further delay with respect to holding an election to elect members of the general Assembly and Senate for the year 1965. Whether there is some purpose in taking away from the duly elected people, duly elected representatives of the people, the right which we wish they would exercise and which we have given them every opportunity to exercise with respect to the Legislature which will be elected in 1966 is, of course, another question.

But as of today a majority of the court is ordering that its previous orders be complied with forthwith, and that Plan A will form the basis for the election of members of the Legislature who will hold office for one year, the year 1966, the calendar year, or whenever, and will be elected on November 2, 1965. The machinery of the election process which you gentlemen have told us about so often can therefore begin to operate.

Caveat: The Court will not issue an order until such time as it can see Plan A in its perfect form. Well, I won't say that. The Court will not implement its order until it can see Plan A in a perfect form, perfected form, and we

give you—how much time did you say? Ten days? I have heard these dates before.

Mr. Zimmerman: Ten days will be splendid.

Judge Waterman: All right, ten days, to see Plan A with all of its minor difficulties straightened out. Please submit it to other counsel also.

Order and opinion, if necessary, will follow in due course.

There is a suggestion we reserve jurisdiction. I don't know anything else we can do.

(Pause)

Judge Waterman: Monday, May 24th, at 10.30 in the morning. You are given, gentlemen, through the 19th in which to straighten out these details and submit copies of the changes to all counsel of record, and they have and you have until the 24th at 10.30 in the morning.

Of course we are not restraining the Legislature from doing anything it can do in the meantime.

Judge Ryan: Nor the Governor.

Judge Waterman: And we aren't restraining any other coordinate branch of the federal government or any of the three branches of the state government, any more than we have at any time restrained action.

Are there any further questions?

Mr. Judd: Should we submit—

Judge Waterman: Just a moment. I spoke for the majority of the court. I want Judge Levet to speak now.

Judge Levet: I want this to stand on the record. I regret that I have to dissent from my brothers on this panel and this is the first time.

Appendix B—Oral Opinions of District Court, May 10, 1965

I am in accord with everything except that I do not agree with the designation of Plan A, either the unadulterated or the reformed version, and I shall state briefly why:

In March, 1962, the United States Supreme Court decided the basic case on reapportionment, Baker vs. Carr, 369 U.S. 186.

On January 11, 1962, this Court dismissed the complaint in WMCA vs. Simon, 202 Fed. Supp. 741.

In June, 1962, the Supreme Court vacated that dismissal and remanded the case to the district court for further consideration in the light of Baker vs. Carr. After remand this three-judge court again held that the New York State apportionment laws then existing were valid, WMCA vs. Simon, 208 Fed. Supp. 368.

On June 15, 1964, the Supreme Court reversed WMCA vs. Lomenzo, 377 U.S. 633, and again remanded to the district court for further proceedings consistent with the Supreme Court's opinion in WMCA vs. Lomenzo, supra, and Reynolds vs. Sim, 377 U.S. 533.

In Reynolds vs. Sim the Supreme Court stated, I quote:

> "State constitutional provisions should be deemed violative of the federal constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions in so far as possible."

At a special session of the Legislature held in December, 1964, four apportionment acts were passed, each of which

Appendix B—Oral Opinions of District Court, May 10, 1965

provided for more than 150 members of the Assembly. These plans were denoted as Plans A, B, C and D.

On February 1, 1965, this Court held that Plans, D, C, and B were each invalid and that Plan A was valid, 238 Fed. Supp. 916.

However, in a proceeding entitled "In the Matter of the Petition of Jerome T. Orans", Honorable Matthew M. Levy, Justice of the Supreme Court, New York County, held that Plan A violated the provisions of the New York State Constitution with respect to the number in the Legislature that is in the assembly. I haven't the citation in Misc. 2d. This decision, of course, was affirmed in the Court of Appeals in an opinion written by Chief Judge Desmond dated April 14, 1965, not, I believe, yet reported.

The time fixed by this court for the submission of a valid apportionment plan was April 1, 1965, by order of July 27, 1964. That was later extended to May 5th. On May 5, 1965, the joint legislative committee on reapportionment filed a tentative Assembly apportionment plan. No plan for the Senate apportionment was submitted, no bill has been submitted, no act has been passed.

The time now remaining before the primary elections is such that the procedures for 1965 election must commence on or about June 1, 1965.

Determination of district lines is necessary in order to permit a basis for designating petitions, revision and enrollment books, and so forth. This time fixed by this court has expired.

In spite of protestations by various parties concerned, no legally authorized plan has been enacted and it is apparent that none will be enacted by the required date.

Appendix B—Oral Opinions of District Court, May 10, 1965

In the papers presented to this court the plaintiffs advocate the appointment of a Special Master. The Attorney General recommends that the court temporarily utilize Plan A, which provides for 165 Assemblymen.

Now, in view of Reynolds vs. Sims it is my opinion that recourse to Plan A is improper and I say that with due respect to the opinions of my brothers on this court, and I myself vote for another procedure, that is, weighted voting.

Weighted voting has been considered by numerous courts. I refer to a number of cases and I will not bore you with any readings from them.

I refer to one which is familiar to me and which is familiar also to Judge Waterman, Musicians Federation vs. Wittstein, 379 U.S. 171 in 1964.

I will read from Justice White's opinion in that case; and that was a case involving the vote at a national convention of musicians, where there were some 280,000 members represented, and I think delegates of some twelve to fourteen hundred.

There Mr. Justice White said, I quote:

> "The pervading premise of both these titles is that there should be full and active participation by the rank and file in the affairs of the union. We think our decision today that the vote of an elected delegate may reflect the size of his constituency is wholly consistent with that purpose."

Now weighted voting has been considered by various courts and has never been fully buried. It has been criticized but not convicted. In Asbury Park Press, Inc. vs. Wooley, 31 New Jersey 1, 161 Atlantic 2d 705, League of

Nebraska Municipalities vs. Marsh, 209 Fed. Supp. 189, Maryland Committee for Fair Representation vs. Tawes, 228 Maryland 412, 180 Atlantic 2d 656; Thigpen vs. Meyers, 231 Fed. Supp. 938, and to some extent Lucas vs. Colorado General Assembly, 377 U.S. 713.

It is my opinion that no interim plan should be based upon a form of legislative plan which violates the New York State Constitution. I am opposed to the use of Plan A.

I do not believe that this court should require a temporary use of a plan which is contrary to the state constitution and which has been so held by the highest court of this state.

Moreover, it seems to me that it is contrary to the general directions of the United States Supreme Court in the Reynolds vs. Sims case which I quoted.

It is not necessary to change the number of the legislators in order to arrive at a solution of the basic apportionment demands of the Supreme Court decision. The use of weighted voting has been approved in certain courts, at least as a temporary solution.

Moreover, Nassau County has utilized a system of weighted voting without serious difficulty. See the article by Professor and County Attorney Jack B. Weinstein in 65 Columbia Law Review 20, page 44. There are also other quotations from the same article which seem to approve this as a stop-gap solution.

Now the formula is an easy one. It doesn't require any computers. It can be done by the simplest form of arithmetical equation. I did it myself, so it must be simple.

You simply have an equation which is as follows:

Population of the state as of 1960 over population of the

district equals 150 over X. Solve that equation for X and you get the vote of this individual.

Now the Attorney General and his associate took a whack at weighted voting, but an unnecessary, unfair crack at it. I think, Mr. Judd, because you assumed in your brief that you would have one vote for Schuyler County and that the others would be built up from that. That is not what I mean, at least, by weighted voting.

Now, as I say, this is a simple formula. It may be computed for each one of the 150. A chart may be prepared in the Legislature when the vote is counted. All they need to do is to add up the votes and it is there. This may be, to some extent at least, somewhat contrary to the state constitution but it doesn't violate any other arrangement in the state constitution. It isn't necessary to change the numbers, as I said, to secure this basic element which the Supreme Court has declared proper. And I believe personally that it is the only way of effectuating the decisions of the United States Supreme Court and I believe that no further delay should be permitted. I think that this is the proper solution.

I do not see how the Attorney General or anyone else can contend that the doctrine of judicial supremacy of the federal court can force the State of New York into what is apparently and has been held by the highest court of this state an unconstitutional provision, whereas a modification here going to the essential thrust of the Supreme Court decisions is necessary and would be warranted under a temporary regime.

Judge Ryan: It would serve no purpose for me to detail why I concur in every respect with the views expressed by

my colleague Judge Waterman today. If occasion requires further comment, at the time a written opinion is filed I will file it. At this time I see no need for it.

Mr. Judd: Your Honor, the question I want to raise is whether for the hearing on the 24th we should submit an order giving effect to what your Honor stated is the direction of the court.

Judge Waterman: You should do more.

Mr. Judd: Submit it beforehand to counsel.

Judge Waterman: You should circulate it.

Needless to say, this court, after four years, would hate to see this case get out of its hands, and we retain jurisdiction.

If there is anything that we can do to facilitate anyone going to the Supreme Court of the United States at any time, we will do all we can to assist.

Judge Ryan: It seems to me, however, that the taxpayers are entitled to a little consideration in this whole picture. This calling for election every year of the Legislature is an expensive proposition. The maintenance of a legislature costs considerable thousands of dollars. Our taxes are being raised every day. The people are entitled to have the Legislature take affirmative action upon this problem.

Judge Levet: I will concur with that.

Judge Waterman: We all concur in that statement.

(Adjournment taken at 12.25 p.m.)

APPENDIX C

Oral Opinions of District Court, May 24, 1965

Judge Waterman: Judge Rifkind, the three of us, no matter how we might split on other things, are not going to vary our order that "There shall be an election this year".

Mr. Rifkind: I have heard you say that, but that does not necessarily cause me to change my view.

Judge Waterman: I am not saying that all the officers who deal with elections cannot be restrained by the State Court action or otherwise, but so far as this court is concerned—moreover, I am not saying that we may not be overturned by a higher court than ourselves—but as far as this court is concerned, there shall be an election in the year 1965.

Mr. Rifkind: So I have heard this court say, and I have heard it said, and I am of course submissive to its views, but I respectfully suggest that when you retire to your chambers you consider not that there shall be an election, but how shall be carried out the purpose of the Supreme Court in WMCA v. Lomenzo. And if you come to that conclusion, you may well come to the conclusion that the holding of an election is an obstruction to that purpose and not a means of bringing it out.

Judge Waterman: It may well be.

Now, so far as your complaint is concerned that we have permitted you to file as an intervenor, we unanimously deny A. We unanimously deny B, and so far as—

Judge Levet: That is correct. I concur in that.

Judge Waterman: As to C, we are split, and you will have to wait until we make an announcement.

Appendix C—Oral Opinions of District Court, May 24, 1965

So far as the County of Nassau is concerned, we accept the statements made by the Attorney General that the matter which you would have us attend to now has been properly taken care of through administrative channels and can continue to be properly taken care of in administrative channels if there is some misunderstanding about it.

Your request that we make an order that you may go to a State Court if you wish is quite immaterial to us. We have never stayed anybody from going into a State Court, and we do not intend to continue the stay. If it creates chaotic conditions, it is not our fault.

Judge Ryan: We do at this time approve the corrections made by the Secretary of State.

Judge Waterman: Oh, yes. It is part of our order.

Judge Ryan: I think we should make that clear.

Judge Waterman: As you will see when we file our order, in case you did not get a copy of it, we have approved the corrections made by the Secretary of State insofar as they were made.

I really think it unnecessary for anyone on the court to make any statement, but at the risk of boring you, we will make additional statements in addition to the statements we made on May 10th.

We do not propose to review the checkered history of this case nor the varying positions taken from time to time by the different parties on it.

On the subject of weighted voting, I might say that I myself have reviewed the different positions taken by the different parties since July of 1961 on the issue of weighted voting, and I find it very enlightening.

Appendix C—Oral Opinions of District Court, May 24, 1965

Now, I will say this: On June 15, 1964, the United States Supreme Court held that New York's scheme of legislative apportionment was in violation of the Equal Protection Clause of the United States Constitution. WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964). Upon remand of the case to this court for further proceedings, after notice to the parties and after hearing, we issued our order dated July 27, 1964, which decreed in part as follows:

> "The 1964 election of Assemblymen and Senators shall be conducted as presently scheduled; provided that the terms of said Members so elected on November 3, 1964, or at any special election to fill vacancies, shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid apportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965, Members so elected to hold office for a term of one year ending December 31, 1966."

Our order was affirmed by the United States Supreme Court on February 1, 1965. Hughes vs. WMCA, Inc., 379 U.S. 694 (1965).

As Judge Rifkind has pointed out—and I will add to what he has said—the decision was a 7 to 2 decision, two justices dissenting altogether, and two of the seven, Justices Goldberg and White said specifically their assent in the court's opinion was occasioned by the fact that they knew

that this court—our court here—could change that order if we wished to change it.

Meanwhile, on December 22 and 23, 1964, the New York State Legislature enacted a Reapportionment Compliance Act, N.Y. Laws 1964, ch. 976, 977-78, 979, 981, consisting of four alternative schemes of legislative apportionment. Upon additional proceedings in this court, after notice and hearing, we submitted a decree dated January 26, 1965, which declared that three of the plans were in violation of the Equal Protection Clause, but that the fourth plan, N.Y. Laws 1964, ch. 976 (Plan A), complied with our prior order. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (SDNY 1965). A resettled order was filed on February 16, 1965, enjoining defendants from effectuating the invalid apportionment schemes.

On March 15, 1965, Justice Levy of the New York Supreme Court held that Plan A was in violation of the New York State Constitution because it enlarged the size of the Assembly beyond 150 members. In the Matter of Orans, 45 Misc. 2d 616 (Sup. Ct. 1965). In order to give the Legislature time to enact another apportionment scheme that would comply with both the Federal and State Constitutions, we extended our deadline for legislative reapportionment from April 1, 1965 to May 5, 1965. Justice Levy's decision was affirmed by the New York Court of Appeals on April 14, 1965. In the Matter of Orans, 15 N.Y. 2d 339 (1965).

On May 10, 1965, the Legislature had not even approached enactment of another apportionment scheme. Consequently, after notice and hearing, we decreed on

that day, by a vote of 2-1 that "Plan A will form the basis for the election of members of the Legislature who will hold office for one year, the year 1966, . . . and will be elected on November 2, 1965." We gave the State ten days to correct minor descriptive errors in Plan A and to settle our decree upon notice, and we added that "of course we are not restraining the Legislature from doing anything it can do" prior to a hearing upon the settled decree, which was set for May 24, 1965.

We three judges agree that 1965 is the last year in which we will permit a malapportioned legislature to govern the State of New York. We have given the Legislature almost ten months to comply with the Federal Constitution; equal protection of the laws can no longer be delayed. See Reynolds v. Sims, 377 U.S. 533, 585 (1964). We are also agreed that there must be a legislative election in November, 1965, pursuant to our original order which was affirmed by the United States Supreme Court. We are loathe to reward the present members of the Legislature for their inaction by granting them another year in office, even under a scheme of weighted voting. (Also see our discussion below of weighted voting.)

Nor can we wait any longer for the Legislature to enact a constitutional redistricting statute. The current deadline for setting in motion the state election machinery is June 1, 1965, the last day on which County Chairmen may notify Boards of Election of positions to be filled; and it is conceded that the clerical task of revising voter rolls in election districts ought to begin forthwith, in the interests of assuring efficient party primaries. See Reynolds v. Sims, supra

at 585. Even if these processes could be delayed for a brief period of a day or two without undue harm except last-minute confusion, the Legislature has given us no ground for hope that the additional time would result in the enactment of a statute redistricting for the election in November, 1965, which would provide for 150 Assembly districts so constituted that we could find the statute, after notice to the parties and hearing after notice, not violative of the Equal Protection Clause, in order that the citizen voters in the large urban and suburban areas of the state who have been invidiously discriminated against have an equality in the Legislature, which the Legislature by its own inaction has denied to these urban and suburban voters.

No one proposes that we order the election in November, 1965, to be held at large. Such a scheme would produce extraordinary confusion in a state the size of New York. Our entire court is also resolved against appointing a special master to recommend a new districting plan for the election to be held in November, 1965. When we issued our order on May 10, 1965, there was no guarantee that a master, if appointed, would finish this complex task in time to avoid disruption of the state election machinery. More importantly, we can hardly conceive of a greater interference with the process of self-government than for us, a three judge United States District Court, to impose on the citizens of New York State a districting plan which has never been enacted by their own elected representatives. Such a course of action should be saved only for circumstances in which there is no viable alternative. See Reynolds v. Sims, supra at 586.

Appendix C—Oral Opinions of District Court, May 24, 1965

We are forced to choose, therefore, between an election under Plan A and an election under the present districting scheme which the United States Supreme Court held to be violative of the Equal Protection Clause, but with weighted voting. It is true that Plan A has been declared invalid under the New York State Constitution because it enlarges the size of the Assembly from 150 to 165 members. At a prior hearing of our court, however, plaintiffs argued in a plausible fashion that the New York State Constitution likewise forbids any deviation from the rule of one legislator—one vote. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 920-21—And this morning it seems to be in the air here that the New York State Constitution, if challenge is brought into the New York State Courts about it—the Court of Appeals would also believe that the State Constitution forbade any deviation from that rule.

In this case, if weighted voting were authorized, it would produce a disparity in voting power of 21:1 between Assemblymen from the largest and smallest districts, according to 1960 citizen census figures. WMCA, Inc. v. Lomenzo, 377 U.S. 633, 648 (1964).

Since at this point I am talking only for Judge Ryan and myself and not for Judge Levet, I will interpolate:

For example, the Supreme Court of the United States in WMCA v. Lomenzo, 377 U.S. 633 at 650-651, highlighted the disparities in the citizen population of three of the present Assembly districts, one in Nassau County, with a citizen population of 314,721; the Schuyler County district, with a citizen population of 14,974, and one in Monroe County with a population of 190,343.

Appendix C—Oral Opinions of District Court, May 24, 1965

Accepting the proposed weighted voting formula of using as a numerator the 1960 citizen population of the present Assembly district represented by these three members and the denominator being the quotient obtained by dividing the total 1960 citizen population of the entire state by 150, we arrive at the following:

The Nassau Assemblyman would have 2.913 votes or almost three full votes. The Schuyler Assemblyman would have .138 of one vote, or something between 1-7th and 1-8th of a vote. The Monroe Assemblyman would have 1.758 or roughly one and three-quarters of a vote.

Surely, these examples demonstrate the inefficiency of the solution—even as a stopgap—of the proposed solution of Senator Zaretzki and Assemblyman Travia, who intervened today. On the chance that weighted voting violates the New York State Constitution, we view it as a much more serious infringement on the public policy of the State of New York than the enlargement of the size of the Assembly by a mere fifteen members, each of the 165 Assemblymen representing a district of approximately equal citizen population.

It is also true that if we order an election under Plan A for November, 1965, but not for November, 1966, the State of New York will have to hold three legislative elections in three successive years under three different districting plans. No one pretends, however, that weighted voting will not present its own practical difficulties, by encumbering and distorting the legislative process. Indeed, the prospect of these practical difficulties has deterred all other courts grappling with legislative malapportionments from effec-

tuating, even as a temporary remedial device, legislative elections complicated by provisions granting different weights to the votes of different legislators.

The District Court in the State of Washington did make such an order but never effectuated it because the Legislature took care of the situation. Other than that one court I know of no other court that has even attempted it.

Now, what are the advantages, if any, in adopting Plan A?

The great advantage of adopting Plan A rather than the present districting plan with weighted voting is that Plan A fully complies with the Equal Protection Clause whereas weighted voting does not. In WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 923-24 (SDNY 1965), we ruled unanimously that a scheme of fractional voting, whereby most of the Assemblymen would cast a full vote, and the remainder would cast fractions of a vote ranging from 3/4 to 1/6 according to the population of their districts, did not furnish equal protection of the laws to citizens of New York State.

This flaw is exacerbating to us and is further made more acute in a scheme of weighted voting which involves this tremendous disparity of 21:1 between the 1960 citizen population of the largest district in Nassau and the smallest district upstate and a comparable disparity in voting power between the Assemblymen elected from such invidiously disparate electorates.

Accordingly, we have ordered that a legislative election be held under Plan A on November 2, 1965, members so elected to hold office for terms of one year. Because Plan A violates the New York State Constitution, however, we make no order beyond this one. Therefore, we expect the

parties to this suit to present to us reasoned proposals by which the citizens of New York State may obtain permanent legislative apportionment which complies with both the Federal and the State Constitutions. We retain jurisdiction to entertain such proposals.

We are very happy to learn today that there may be a commission, non-political in nature, provided for to begin the study of this matter promptly and that there may be legislative acts which will meet the constitutional tests under both constitutions to provide for some implementation for the election to be held the year following this.

This court will be available during the first two weeks of June, and we will be available, as we have been in the past, at different times whenever orders to show cause or motions may be filed, to assist in any way that we can.

We reserve the question of the master method for the election for the year succeeding the present year. We take no position on it at the present time.

I have nothing more that I wish to say.

Judge Ryan: I concur.

Judge Levet: I want to put this on the record—

Judge Waterman: Judge Ryan and I for a majority of the court deny your paragraph D.

Judge Levet: I must dissent, even though I am alone.

Obviously, all of us, I think, agree with the statement of Judge Rifkind that this has been a cataclysmic set of events of seismographic dimensions in its effect upon the political structures of states and, to some extent, on other subordinate bodies.

Appendix C—Oral Opinions of District Court, May 24, 1965

I concur in part, as has been indicated, with the majority opinion, first in the decision to require an election in 1965 for the year 1966; second, in the general determination not to continue the present distribution of legislative voting power, in other words, that an attempt must now be made to remedy the status heretofore declared by the Supreme Court in conflict with the 14th Amendment.

Third, I agree that there should be no election at large.

Fourth, I agree, at least at the present time, that there should be no special master appointed.

However, I respectfully disagree with the temporary remedy proposed by the majority of this court, and, as you can see, there have been no conversions.

On May 10, 1965, I stated my reasons for dissent from the majority's directive for the use of Plan A for the year 1966. I recapitulate in brief, and I augment briefly:

First, Plan A has of course been declared unconstitutional as to the number of legislative membership. See the Orans case, decision by Chief Judge Desmond, 14 N.Y.S., 39.

Second, Judge Matthew Levy indicated in his opinion that there was clear evidence of gerrymandering in that plan. See Orans 25 Misc. 2nd 616.

Thirdly, to correct a legislature of an improperly based membership is unwise, since adoption will create future difficulties of expansion and contraction and might leave a void for the 1965 election.

It is my opinion that the 14th Amendment gives no possible power, no basis for this court to suspend the valid provisions of the State Constitution unless directly necessary to obtain the results demanded by the governing deci-

sion by the Supreme Court affecting legislative apportionment in this state.

I agree with Judge Rifkind and his general assertions and arguments along that line.

Whether the Federal Courts should mould their decrees in equity so that the constitutional provisions of the State of New York with respect to composition, not the apportionment or districts, shall be observed is the issue presented to this court. Even the temporary adoption of Plan A by order of this court violates what I believe to be a basic principle governing the relationship of states and nation under our Federal Constitution.

Moreover, equitable remedies are limited to the relief required and should be tailored to necessity rather than to convenience.

I thus dissent to the remedy provided. I adhere to my vote for weighted voting of legislators elected under the present districts which have been approved heretofore, both in the Assembly and in the Senate.

No firm determination is now possible in order to secure any adjudication of any revision of the districts.

At a time soon enough for the election procedures of a 1965 election, voting for the 150 Assemblymen and some 50-odd Senators at large is confusing and impractical. Retention of the present voting power would be unwarranted and illegal.

The use of weighted voting as I described it, and apparently in general, at least, without approving the exact details—my statements are somewhat academic along this line by now—as proposed by Judge Rifkind here and his

clients, has some disadvantages, but it is the lesser of the evils.

Weighted voting by committee members is unnecessary, since the real test is the final enacting vote.

Some of the opponents of this method—and I do not refer to my colleagues—set up straw bugaboos and then knocked them over. For example, recently, counsel for the Mulligan Commission, a good friend of mine, Thomas B. Gilchrist, Jr., in addressing some of the voters of Westchester County, said the plan would gum up the committee system. Well, all I can say in reply to that is that the gum is imported.

Now, we have here today, and I wish to thank them, the two representatives from the universities, one a political science teacher from the University of Rochester and the other a member, I believe, or editor of the Columbia Law Review, whose material we have received here.

The first article, which is from the Rutgers Law Review, was written by John F. Bansoff III and was submitted here to us. I have read it.

Now, the principal arguments of this are twofold. One, it is said that districts with small voting power cannot defeat bills supported by those with large voting power. I assume that that was one of the purposes of the decision in Washington, WMCA v. Lomenzo.

Secondly, it is asserted that one representative with, say three votes or 2.9, whatever it is, will not split his vote.

Now, with due respect to the academic world, I wonder whether they have ever heard of caucus votes. I have.

Now, the other article, written by Professor Riker of the

University of Rochester, contains a technical discussion with all sorts of formulae to illustrate possible but not probable or likely defects of this method. The statement is made that one of the plans submitted by the Legislature carried fractional voting or weighted voting or weighted voting, whichever term was used, and to compare that with the proposed plan is not sound. That plan, as I recall the legislative enactments, provided for one vote for the least populated districts, such as Schuyler County—am I wrong, Mr. Zimmerman?

Mr. Zimmerman: One-sixth.

Judge Levet: One-sixth vote. Well, whatever it is, it makes no difference in the last analysis. Obviously, if there is a county with a certain population and another county with a population of 21 times that, there is no basic reason why the more populous county should not have the more effective vote.

That again, I say, is one of the purposes of the decision of the Supreme Court.

All in all, then, I do not believe that the possible constitutional invalidity of this method is important. I think that to adopt Plan A and to reject this is to strain at a gnat and swallow a camel, if I may say so, with all due respect.

The collision involved between Plan A and the Constitution of the state is clearcut, decided. It is in effect determining the number of the legislators of this state. On the other hand, the collision between this weighted system and the State Constitution obviously must be accepted if there is a direction for it, because it does not, unlike Plan A, result

in the Federal Government dictating a term of a temporary state constitutional organization.

Now, I say this without intending to be cynical and without intending to be critical and with some degree of, shall I say, distant knowledge about politics. We have here what some people might have called what Judge Frankfurter called a political thicket.

There is nothing wrong with politics. Politics is a means by which the wishes of the people of a state or any unit are validly effectuated and without any indication of what the present situation means from that standpoint, I note the attempts, at least, even though they may be belated, to do something about this, and I believe that the emergence from this condition which faces this state can only be remedied with the cooperative statesmanship of the leaders of the State Legislature.

I therefore dissent as to the remedy.

I vote to oppose, at least, the adoption of any Plan A, and assert, since there is no other present remedy proposed, to adopt the method I have suggested. That is my opinion.

Judge Waterman: The order of the majority of the court is filed. We recess until such time as further motions bring us together.

APPENDIX D

July 13, 1965 Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 61–1559

WMCA, INC., R. PETER STRAUS, et al.,

Plaintiffs,

and

ANTHONY J. TRAVIA and JOSEPH ZARETZKI,

Plaintiffs-Intervenors,

—against—

JOHN P. LOMENZO, Secretary of State of the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York, et al.,

Defendants,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,

Defendants-Intervenors.

Acting upon an application dated April 19, 1965 presented to us by the Attorney General of the State of New York, and after proceedings thereon in open court on May 10, 1965, and on May 24, 1965, this Court at the conclusion of the May 24, 1965 hearing filed in open court in the presence of counsel an order embodying the following mandates:

Appendix D—July 13, 1965 Order of District Court

"IT IS HEREBY ORDERED THAT:

"1. An election of members of the New York State Legislature shall be held on November 2, 1965, provided that the terms of the members so elected on that date or at any special election to fill vacancies, shall expire on December 31, 1966.

"2. Though the purported statute is itself presently ineffective, the scheme set forth in the Reapportionment Compliance Act, Chapter 976 of the Laws of 1964, together with such clerical corrections as have been certified to us by the Secretary of State pursuant to our order of May 10, 1965, in accord with the procedures set forth in § 403 of said ineffective Act, shall form the basis for the election of members of the New York State Legislature at the general election on November 2, 1965 and for any primary contest to nominate candidates for the Legislature or for any special election to fill vacancies prior to December 31, 1966. There is attached hereto and made a part hereof copies of the Act and the certified clerical corrections.

"3. Jurisdiction of further proceedings which may be found to be necessary in this Court is retained."

Notice of entry of this order was mailed to the attorneys for all parties on May 25, 1965, and on that day we denied an application filed on behalf of plaintiff-intervenors Anthony J. Travia and Joseph Zaretzki for a stay pending appeal of the order. The Supreme Court of the United States on June 1, 1965, one Justice dissenting, denied both

a motion to accelerate the hearing of the appeal and a motion to stay our order pending appeal.

Despite the foregoing, on or about June 22, 1965, one Frank J. Glinski and one William F. Keenan filed a suit in the Supreme Court of the State of New York, Albany County, seeking, among other things, an order restraining the Secretary of the State of New York from taking any action in obedience to our May 24, 1965 order.

On July 5, 1965, a Justice of that Court granted that prayer, and on July 9, 1965, after the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, on July 7, 1965 had unanimously reversed the lower court, the New York Court of Appeals reversed the Appellate Division and reinstated the Supreme Court Justice's injunctive order.

On July 9, 1965 application was then made to this Court for an order requiring Glinski and Keenan to show cause why they and all parties to this action should not be enjoined from interfering with the carrying out or execution of our order of May 24, 1965, and for other relief appropriate to effectuate said order, and

Now, after notice of said application, hearing thereon this day, and due deliberation:

IT IS HEREBY ORDERED THAT:

Frank J. Glinski, William F. Keenan, and all parties to this action, their agents, attorneys and servants, their successors and all other persons are hereby forever restrained and enjoined from interfering with the carrying out and execution by any and all New York State officers and elec-

tion officials and their successors and all other persons of the order of this Court of May 24, 1965.

Dated: July 13, 1965.

/s/ STERRY R. WATERMAN
United States Circuit Judge

/s/. SYLVESTER J. RYAN
United States District Judge

/s/ RICHARD H. LEVET
United States District Judge

APPENDIX E

Oral Opinions of District Court, July 13, 1965

Judge Waterman: First of all, we deny the motion of Messrs. Glinski and Keenan that the proceedings before us this day be dismissed.

Gentlemen, we have read the recent opinions of the judges of the New York Court of Appeals with great respect and with no little concern. We have great respect for the individual judges of that court as individual judges, and we share of course with the entire American judicature great respect for the court as a court.

We had thought that the order of this court of May 24, 1965, and the subsequent denial of a stay of this order by the United States Supreme Court, at last laid to rest all objections to this court's order mandating an election in the fall of 1965 of a new State Legislature to hold office for a term of one year.

We do note the statement of the chief judge of the New York Court of Appeals, however, that, and I quote, "Despite those illegalities of Plan A under which a 1965 election is supposed to be held, we would of course be obliged to respect and follow the federal court's orders that such an election be held this year if those courts had made final and binding orders therefore."

We intended the order of this court of May 24, 1965, to be exactly such an order, so directing. We believe the order did expressly state such a judgment, but to remove any question as to its purpose, intent or wording, we are entering a further order containing mandatory and injunctive provisions.

Appendix E—Oral Opinions of District Court, July 13, 1965

Judge Ryan: I concur with the statement now made by Judge Waterman.

Judge Levet: I concur with this statement.

I have heretofore expressed my opinion against the use of Plan A as the basis for the election to be held in November, 1965, although I have always approved of a 1965 election. However, the majority of this court has directed and has ordered the use of that plan, Plan A, in this year's election of the members of the Legislature for the year 1966. The United States Supreme Court has refused to stay such election on such a basis.

The election machinery of this state, as has already been indicated here this morning, has been implemented to the use of Plan A for the 1965 election. A shift at this time would create endless confusion.

Accordingly, I concur at least in the result directed by the statement made here by Judge Waterman, and I concur in the order which is this day made.

Judge Waterman: I would like to read the order which like the order before was read in court.

"Acting upon an application dated April 19, 1965, presented to us by the Attorney General of the State of New York, and after proceedings thereon in open court on May 10, 1965, and on May 24, 1965, this court at the conclusion of the May 24, 1965, hearing filed in open court in the presence of counsel an order embodying the following mandates:

> " 'It is hereby ordered that,
>
> " '1. An election of members of the New York State Legislature shall be held on November 2, 1965

provided that the terms of the members so elected on that date or at any special election to fill vacancies, shall expire on December 31, 1966.'

"'2. Though the purported statute is itself ineffective, the scheme set forth in the Reapportionment Compliance Act, Chapter 976 of the Laws of 1964, together with such clerical corrections as have been certified to us by the Secretary of State pursuant to our order of May 10, 1965, in accord with the procedures set forth in Section 403 of said ineffective Act, shall form the basis for the election of members of the New York State Legislature at the general election on November 2, 1965 and for any primary contest to nominate candidates for the Legislature or for any special election to fill vacancies prior to December 31, 1966.'

"There is attached hereto and made a part hereof copies of the Act and the certified clerical correction."

Counsel will recall that I handed the order with the Act attached to it and the corrections from the Secretary of State over the top of the bench and to the clerk.

Back to the order.

"'3. Jurisdiction of further proceedings which may be found to be necessary in this court is retained.'

"Notice of entry of this order was mailed to the attorneys for all parties on May 25, 1965, and on that day we denied an application filed on behalf of plaintiff-intervenors Anthony J. Travia and Joseph Zaretski for a stay pending appeal of the order.

Appendix E—Oral Opinions of District Court, July 13, 1965

"The Supreme Court of the United States on June 1, 1965, one justice dissenting, denied both a motion to accelerate the hearing of the appeal and a motion to stay our order pending appeal.

"Despite the foregoing, on or about June 22, 1965, one Frank J. Glinski and one William F. Keenan filed a suit in the Supreme Court of the State of New York, Albany County, seeking, among other things, an order restraining the Secretary of the State of New York from taking any action in obedience to our May 24, 1965, order.

"On July 5, 1965, a justice of that court granted that prayer, and on July 9, 1965, after the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, on July 7, 1965, had unanimously reversed the lower court, the New York Court of Appeals reversed the Appellate Division and reinstated the Supreme Court justice's injunctive order.

"On July 9, 1965, application was then made to this court for an order requiring Glinski and Keenan to show cause why they and all parties to this action should not be enjoined from interfering with the carrying out or execution of our order of May 24, 1965, and for other relief appropriate to effectuate said order; and

"Now, after notice of said application hearing thereon this day, and due deliberation, it is hereby ordered that Frank J. Glinski, William F. Keenan and all parties to this action, their agents, attorneys and servants, their successors and all other persons are hereby forever restrained and enjoined from interfering with the carrying out and execution by any and all New York State officers and elec-

tion officials and their successors and all other persons of the order of this court of May 24, 1965.

"Dated: July 13, 1965.

STERRY R. WATERMAN,
United States Circuit Judge

SYLVESTER J. RYAN,
United States District Judge

RICHARD H. LEVET,
United States District Judge."

I hereby, in the presence of counsel in open court, hand this original signed order to the clerk of the court.

I used June 28th because that is what the Court of Appeals used, and I would like to comply with that. Since it is June 22nd, will you change that.

Your rights are preserved, sir.

Mr. Rifkind: I want to ask one question. I want to be sure that I am not in contempt if I pursue further the application that I made to Mr. Justice Harlan for a stay of the May 24th order.

Judge Waterman: That, sir, is ~~recognized~~ recognition by the very Act itself, the legitimacy and the power and force of this order. You are encouraged to do it, sir.

Mr. Rifkind: Thank you, sir.

Mr. Fleming: Your Honor, if it may please the court, may I formally, if it is consistent with your procedure, ask for a stay of the order you have just entered—

Appendix E—Oral Opinions of District Court, July 13, 1965

Judge Waterman: For what purpose?
Mr. Fleming: For the purpose of appeal, your Honor.
Judge Waterman: Motion denied.
Any further motion?
Anybody wish on the record to protect any rights.
Court recessed.

APPENDIX F

Order of New York Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of July in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk

Remittitur July 9, 1965.

3. No. 300 65

FRANK J. GLINSKI, individually and as State Senator for the 56th Senatorial District of New York, & ano.,

Appellants,

—vs.—

JOHN P. LOMENZO, individually and as Secretary of State of the State of New York,

Respondent.

BE IT REMEMBERED, that on the 8th day of July in the year of our Lord one thousand nine hundred and sixty-five,

Frank J. Glinski, individually and as State Senator for the 56th Senatorial District of New York, & ano., the appellants in this cause, came here unto the Court of Appeals, by Robert B. Fleming, their attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And John P. Lomenzo, individually and as Secretary of State of the State of New York, the respondent— in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Robert B. Fleming, of counsel for the appellants, and by Mr. Orrin G. Judd of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified, without costs, by reinstating so much of the order of Special Term as contained an injunction against the holding of an election on November 2, 1965, under Plan A, and, as so modified, affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be modified, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 9, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

/s/ RAYMOND J. CANNON
Clerk

APPENDIX G

Opinions of New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

GLINSKI v. LOMENZO

DESMOND, *Ch. J.*:

I would modify the order appealed from by reinstating the Special Term's injunction against a 1965 election of legislators under Plan A (and to this reinstatement a majority of this Court agrees).

To bring to a prompt end the present difficulties, some of us would add to our mandate these additional directions: first, that a constitutional convention be held beginning March, 1966 with delegates to be elected at this Fall's general election; and, second, that until an election of legislators under a valid districting plan, the presently seated legislators shall continue to sit, and to vote under an appropriate system of weighted voting.

As we have not hesitated to do in the past (*Moore* v. *Walsh*, 286 N.Y. 552) we must perform our sworn duty by preventing the holding of an election which violates our state constitution. The *Moore* decision (and *Burke* v. *Terry*, 203 N.Y. 293) is flat and compelling authority for the exercise of such power by us and the unconstitutionality of holding an election of legislators under Plan A in 1965 is much clearer than was the alleged infringement acted on in *Moore* v. *Walsh*.

Neither Federal supremacy (U.S. Const. Article VI) nor the rules against interference with federal courts by state

courts (U.S. Const., Analysis and Interpretation, U.S. Printing Office, 1964, pp. 709-727) have any application here. I find no binding federal court order forbidding us to deal with this problem of state government—indeed, the district court (twice) and the United States Supreme Court itself has suggested or directed that as to state questions the state courts are still empowered to control state elections (see *Reynolds* v. *Sims,* 377 U.S. 533, 584). It is impossible to escape the fact that an election of legislators this fall would violate in at least two respects the positive provisions of our state constitution—as to elections every two years and as to the number of Assemblymen (N.Y. Const., Article III, § 2; *Matter of Orans,* 15 N.Y. 2d 339). Despite those illegalities of "Plan A" under which a 1965 election is supposed to be held, we would of course be obliged to respect and follow the federal courts' orders that such an election this year if those courts had made final and binding orders therefor. To repeat, I have seen no such order. All the previous federal decisions were based on the assumption that the 1964 or the 1965 legislature would—neither did—pass a valid legislative districting statute. The May 24, 1965 decision of the federal three-man district court did no more than decline to change its previous orders. Obviously and under settled principles, the subsequent denial of a stay by the United States Supreme Court decided nothing. The appeal to that court still pends.

Basically, the question is: Shall we obey the positive directions of our own state constitution in the absence of a controlling decision otherwise commanding that an un-

constitutional election be held? I answer: "Yes". The injunction prayed for must be granted.

The order should be modified, without costs, in accordance with this opinion.

BURKE, *J.* (concurring)

The time and method of holding an election for state officials is a state question. The United States Supreme Court has directed that the greatest possible deference be paid to state action. *Reynolds* v. *Sims,* 377 U.S. 533; *Scott* v. *Germano* U.S. , 33 U.S.L.W. 3387, June 1, 1965. But the 1964 and 1965 legislatures have failed to provide legislative apportionment by a constitutional election or otherwise to carry on government.

Since both the present legislative apportionments are totally void, *W.M.C.A. Inc.* v. *Lomenzo,* 277 U.S. 633 (1964); in *Re Orans,* 15 N.Y. 2d 339, and since the United States Supreme Court had directed that an election be held in 1965 *only if* there is a valid legislative apportionment, the defendant must be enjoined from holding an election under Plan A which would place power in the case of an illegally constituted legislature, in *Re Orans, supra.* Therefore, an election this year can only be held constitutionally by providing that the proper number of legislators be elected at large. Under these circumstances, I would limit the relief sought by the plaintiffs to a reversal of the order of the Appellate Division and the reinstatement of the order and judgment of the Supreme Court, Albany County.

FULD, VAN VOORHIS and BERGAN, *JJ.*, dissent in the following memorandum:

In our view, the decision now being handed down serves only to further confound a most unfortunate and confused situation.

The members of the New York State Legislature who are now in office were elected under an apportionment which the Supreme Court of the United States has held to be invalid under the Fourteenth Amendment to the Constitution of the United States. (See *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633.) The decision of the three-judge Federal District Court directing an election in 1965 under "Plan A" (Reapportionment Compliance Act, L. 1964, ch. 976) implements the Supreme Court's holding in the *WMCA* case (377 U.S. 633 *supra*). That there should be an election this year, 1965, in order to avoid the consequences of the prior unconstitutional malapportionment was evidently a primary object of the federal courts in arriving at their conclusion (see, e.g., *Hughes* v. *WMCA, Inc.*, 379 U.S. 694) and, some six weeks ago, the three-judge district court concluded that there was insufficient time to fashion any new apportionment scheme without jeopardizing an election in 1965. (See *Travia* v. *Lomenzo*, 241 F. Supp. .)

For the courts of the state now to grant injunctive relief, preventing the holding of an election in 1965, would be in direct conflict with the district court's decision, a decision which, in view of the Supreme Court's recent denial of an application for a stay, has that tribunal's implicit approval. (See *Travia* v. *Lomenzo*, U.S. , 85 S. Ct. 1582.)

Such a conflict between federal and state judicial power should be avoided in the interest of the public order and the proper administration of justice. In this litigation, the federal courts long ago assumed jurisdiction to implement the reapportionment decisions of the United States Supreme Court and, even if our state courts possessed a concurrent jurisdiction, the established rule is that under such circumstances the court first exercising jurisdiction does so to the exclusion of the other. We should not here depart from this rule.

The order appealed from should be affirmed.

BERGAN, *J.*:

The direction of the federal District Court for the election of a Legislature in 1965 in accordance with the terms of the 1964 apportionment statute is in conflict with the New York constitution, both by the constitution in itself and by the decision of this Court interpreting the New York constitution and holding the statute invalid (*Matter of Orans*, 15 N.Y. 2d 339). Under New York Law, then, no election should be held in 1964 or will be valid, if held.

But, a direction to hold such an election has been made, nevertheless, as an exercise of federal judicial power, and the United States Supreme Court has not yet interfered with this order made by the District Court, although its attention has been called to the violation of our constitution and the contrary decision of this Court.

But to grant a state court injunction against the enforcement of a federal court order amounts to a confrontation of power which ought to be avoided if possible, in the interest of orderly government within the Federal Unit, en-

tirely aside from the vagaries of the supremacy clause as applied to a situation of this kind.

The result of the decision now being made is that a court of one sovereign authority has directed the New York Secretary of State to prepare an election in 1965 and the court of another sovereign authority has prohibited him from doing just that.

The legal differences over the exercise of the power of New York to govern itself can be resolved definitively by the Supreme Court of the United States in reviewing the decision of this Court; and cannot be resolved adequately by a clash of conflicting orders between the New York Supreme Court and the United States District Court. Because of this, the order appealed from should be affirmed.

* * * * *

Order modified, without costs by reinstating so much of the order of Special Term as contained in injunction against the holding of an election on November 2, 1965 under Plan A, and, as so modified, affirmed. Opinion by Desmond, Ch. J. in which Dye and Scileppi, J.J. concur; Burke, J., concurs for modification in a separate opinion; Fuld, Van Voorhis and Bergan, J.J., dissent and vote to affirm in a memorandum, Bergan, J., in a separate opinion.

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Office-Supreme Court, U.S.
FILED
SEP 2 1965
JOHN F. DAVIS, CLERK

No. 449

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PAUL R. SCREVANE, President of the City Council of the City of New York, and JAMES POWER and MAURICE J. O'ROURKE, Commissioners, Board of Elections, New York City,

Appellants,

against

JOHN P. LOMENZO, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, EUGENE H. NICKERSON, County Executive, Nassau County, FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, and JOHN R. CREWS and THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Defendants-Appellees,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,
Defendants-Intervenors-Appellees,

and

WMCA, INC., R. PETER STRAUS, JOSEPH DeMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Plaintiffs-Appellees,

and

ANTHONY J. TRAVIA and JOSEPH ZARETZKI,
Plaintiffs-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM OR DISMISS

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IN THE

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Defendants-Appellees,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,

Defendants-Intervenors-Appellees,

and

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY,

Plaintiffs-Appellees,

and

ANTHONY J. TRAVIA and JOSEPH ZARETZKI,

Plaintiffs-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM OR DISMISS

Statement

The Jurisdictional Statement filed by the Corporation Counsel of the City of New York presents no questions which have not already been raised by the appeals in

WMCA, et al v. *Lomenzo, et al* and *Travia, et al* v. *Lomenzo, et al* (Nos. 85 and 191, Oct. T. 1965 (J. St. 2-3, 3-4)). Rather than repeat previous contentions, we, WMCA, Inc., R. Peter Straus, *et al.*, the original plaintiffs in this proceeding, limit ourselves in this memorandum to apprising the Court of recent developments which themselves further indicate the insubstantial nature of all of the appeals now pending relating to New York's apportionment.

Argument

New York is now in a transitional state, moving from government by a malapportioned legislature to government by a legislature elected in conformity with Federal and State constitutional standards. The recent proliferation of appeals in the state and federal courts (*WMCA, et al* v. *Lomenzo, et al,* No. 85; *Travia, et al* v. *Lomenzo, et al,* No. 191; *Scrovane, et al* v. *Lomenzo, et al,* No. 449; and *Matter of Orans,* No. 319) highlights not only the temporary and transitional nature of the present situation, but also the fact that progress is being made toward achieving the objective of constitutionally acceptable legislative districts in New York.

As the original plaintiffs in the action, WMCA, Inc., R. Peter Straus, *et al.*, at first opposed the implementation of Plan A (See Tr. 10-12, March 22, 1965). However, we supported the District Court's order for an election in November of 1965 under Plan A when it appeared that the only alternative was no new election at all and the continued tenure of the malapportioned legislature. It is significant that the order of the District Court explicitly states that Plan A is to govern only for the interim 1965 election (Tr. 185, May 24, 1965). This Court has denied an application to stay that order. *Travia* v. *Lomenzo,* U. S. , 14 L. Ed. 2d 480 (1965).

In addition to the order implementing Plan A, the following other significant actions have also been taken in New York for the purpose of achieving a fair and permanent apportionment system.

The legislature has passed and the Governor has signed a bill placing on this November's ballot the question of whether a constitutional convention should be called which would enable the adoption of a valid state constitutional provision relating to apportionment. Election Law, ch. 371 (1965).

The District Court, on May 24, 1965, reserved decision on the question whether a special master should be appointed in the event that the legislature which convenes this January is unable to enact an acceptable apportionment system (Tr. 186).

The Supreme Court of New York in an opinion dated August 24, 1965 (see Appendix A) has acknowledged that it will act in early 1966, to fill any vacuum caused by legislative inability to establish a valid apportionment and has recognized that any plan promulgated by it will be subject to the review of the federal district court. New York is thus given reasonable assurance of achieving, in the very near future, not only a constitutionally acceptable apportionment plan, but also one which will be created by an instrumentality of the State and submitted for federal court approval.

Thus, significant steps are being taken and progress is being made toward the fulfillment of the mandate of this Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964) with a minimization of delay and federal-state conflict. If this Court were to note probable jurisdiction in any of the pending appeals, the inevitable consequence would be to delay substantially any further progress toward a permanent solution pending the outcome of the appeals. As is

demonstrated in the Motions to Dismiss or Affirm previously filed with the Court, no issue raised in any of these appeals is so substantial as to warrant such delay.

CONCLUSION

For the foregoing reasons, we submit that the decision below implementing Plan A is correct and that this appeal presents no substantial question. The order of the three judge district court insofar as appealed from herein should be affirmed.

August 31, 1965.

Respectfully submitted,

LEONARD B. SAND
Robinson, Silverman, Pearce, Aronsohn & Sand

MAX GROSS
Attorneys for Plaintiffs-Appellees

APPENDIX A

SUPREME COURT

NEW YORK COUNTY

Special Term—Part I

In the Matter

of

The Petition of JEROME T. ORANS, etc.

CULKIN, J.:

This is a motion brought by Anthony J. Travia and Joseph Zaretzki, New York State Assembly Speaker and President pro tem of the State Senate respectively, for leave to intervene as parties petitioner herein. They assert intervening claims on their own behalves, as members of the Legislature, citizens and taxpayers and on behalf of all citizens and taxpayers of New York. Assuming permission to intervene will be granted, these applicants further move for an order, pursuant to Article 43 of the CPLR, appointing three referees,

> "* * * for the purpose of formulating a comprehensive plan to reapportion the Senate and Assembly of this State, without regard to political considerations, and in a manner which complies with the Fourteenth Amendment of the United States Constitution and with all applicable provisions of the New York State Constitution not in conflict with the United States Constitution * * *".

Petitioners also seek an order decreeing that the November 1966 election of members of the Legislature is to proceed upon the basis of such plan, unless the Legislature enacts an acceptable reapportionment plan of its own on or before February 1, 1966.

A brief review of recent history is necessary to put the instant proceeding in proper prospective. Following a determination by the Supreme Court of the United States that the apportionment under which our present Legislature was elected is invalid under the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution (*WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633), the matter was remanded to a three-judge District Court for further proceedings. On July 27, 1964, that court issued an order providing (1) that the 1964 legislative elections could proceed under the invalidated apportionment system but that the legislators would be permitted to serve only a one-year term, instead of the two-year term provided in our State Constitution, (2) that a special 1965 election must be held under a constitutionally valid apportionment plan to be enacted by the New York Legislature and submitted to the District Court for approval not later than April 1, 1965, the legislators so elected again to serve for only one year and (3) the regularly scheduled November 1966 election for a normal two-year term would be held under the same or some other court-approved reapportionment plan. On appeal the United States Supreme Court summarily affirmed this order (sub. nom. *Hughes* v. *WMCA, Inc.,* 379 U. S. 694). A special session of the Legislature was convened late in 1964, wherein a series of Reapportionment Compliance Acts were enacted, and, in due course, these were submitted to the three-judge District Court for approval. That court rejected three of the plans submitted but declared that Plan A (Chap. 976 of

the Laws of 1964) complied with the provisions of the Federal Constitution and the order of July 27, 1964 (238 F. Supp. 916). The District Court did not concern itself with objections to Plan A based upon claimed violations of the State Constitution, but indicated that such questions were properly to be decided by our State courts. This was in conformity with the views expressed by the United States Supreme Court in a number of recent reapportionment cases, to the effect that determination of questions of State constitutionality should be left to the State courts and that the greatest possible deference to State action should be shown by the Federal courts (see e.g., *Reynolds* v. *Sims,* 377 U. S. 533 and related cases decided the same date, June 15, 1964; see also *Scott* v. *Germano,* 381 U. S. 407, June 1, 1965).

In January, 1965, petitioner Orans commenced the captioned special proceeding which resulted in a Special Term judgment declaring that the federally approved Plan A (the Reapportionment Compliance Act of 1964), which provided for an Assembly consisting of 165 members violated a State constitutional provision calling for an Assembly of 150 members. The act was also held void as to State Senate reapportionment in view of the State constitutional provision that reapportionment and redistricting of both Senate and Assembly must be by the same law (45 Misc 2d 616, Levy, J.). (Meanwhile, the three-judge District Court extended the State's deadline for submitting an acceptable reapportionment plan from April 1, 1965, to May 5, 1965.) On April 14, 1965, the Court of Appeals affirmed this court's judgment as to the unconstitutionality of the 1964 Reapportionment Compliance Act (15 N Y 2d 339). The present Legislature then made a belated attempt to devise a reapportionment plan within the 150-member limitation, but the plans, as of the May

deadline, were incomplete and wholly inadequate. Ignoring the Court of Appeals holding in this case, that Plan A violated the New York State Constitution, a majority of the three-judge District Court, on May 18, 1965, ordered the November 1965 legislative election to proceed under Plan A. The United States Supreme Court refused to grant a stay of the May 18th order and refused to accelerate an appeal (sub. nom. *Travia* v. *Lomenzo,* 381 U. S. 431). Thereafter, a new State court action was commenced in Supreme Court, Albany County, by State Senator Glinski, to enjoin all State officials from conducting the 1965 November election under the invalidated Plan A. On July 9, 1965, the Court of Appeals rendered a decision in this new action enjoining the holding of the 1965 election (*Glinski* v. *Lomenzo,* N Y 2d No. 300, July 9, 1965). This action was based upon a finding by a majority of the court that no "final and binding" order requiring the election had yet been issued by the three-judge District Court in *WMCA, Inc.* v. *Lomenzo,* and the court's obligation to prevent the holding of an election which violates our State Constitution (see, *Moore* v. *Walsh,* 286 N. Y. 552). The Court of Appeals proved to be mistaken as to the intent of the District Court. On July 13, 1965, said District Court enjoined all persons from interfering in any way with the holding of the November 1965 election under Plan A. The United States Supreme Court (Mr. Justice Harlan acting) has refused to stay this order pending appeal; consequently, the 1965 legislative election shall have been held before this matter is again considered by the United States Supreme Court.

Immediately upon denial of said stay, the instant applications were brought herein. Since Assembly Speaker Travia was a necessary party respondent in the original review proceedings commenced herein (McKinney's

Unconsolidated Laws, §4221 et seq. [Laws of 1911, Chap. 773]), his right to intervene must be deemed absolute (CPLR 1012[a]1). However, such intervention must be as a party respondent and shall take the form of a substitution of parties as between respondent Borkowski and intervenor Travia. Of course, the fact that intervenor Travia is a respondent does not prevent him from joining intervenor Zaretzki in seeking affirmative relief herein.

The application of Senator Zaretzki to intervene as a party petitioner is granted. Such intervention appears proper under CPLR 1012(a)2 and shall be allowed, in any event, under CPLR 1013. Petitioner Orans opposes the intervention of petitioner Zaretzki on the ground that the Senator's interests and the interests of those he purports to represent in this proceeding are being adequately represented by the present petitioners. His attorney notes with pride that petitioners have been the successful parties thus far. However, the foregoing recitation of recent events demonstrates that petitioners' victory thus far is a Pyrrhic one. Notwithstanding a declaration of the invalidity of Plan A (15 N. Y. 2d 339), we face the possibility of having the federal courts impose such reapportionment plan permanently upon our State. For reasons discussed below, it is necessary for this Court to act *now* in this matter. Consequently, the interests of all the citizens and taxpayers of New York State are being inadequately represented by present petitioners to the extent that said petitioners oppose a request for affirmative relief at this time when such a request appears to be in the best interest of our citizens. Indeed, in the course of argument, petitioner Orans has come to concede the need for eventual intervention of this Court in the manner requested by the movants, and

now asks that denial of the requested reference be without prejudice to a renewal at some later time. The remaining petitioners, through their spokesman, Edward I. Koch, concede the right of both applicants to intervene herein, approve of the request for the appointment of referees, but oppose the nomination of any present legislator or one chosen by such legislator on the grounds of likely partisanship and they ask this Court to select prominent non-partisan citizens for the task of reapportionment.

Respondents oppose the intervention and the further requested relief on a number of unacceptable grounds. Respondents contend that there is nothing left of this proceeding, originated pursuant to Article III, Section 5 of the Constitution of the State of New York and Chapter 773 of the Laws of 1911 (McKinney's Unconsolidated Laws, §4221 et seq.), in which the movants may intervene. They contend that the original proceeding ended in a final judgment (45 Misc. 2d 616) affirmed by the Court of Appeals (15 N. Y. 2d 339) and that this "exhausted" the court's power to proceed pursuant to the special statutory review provision. If the court's general equity power is being invoked, argue respondents, then let the intervenors do it by appropriate plenary proceedings, rather than by attempting to revive the instant cause. In so arguing respondents misread and misunderstand the purpose of the special statutory provisions for reapportionment review. Respondents would make it a meaningless procedure whereby the courts make abstract declarations of constitutionality without any regard to the practical consequences of such declarations. In the present situation, the intervention of the three-judge District Court has prevented enforcement of injunctive

relief granted as a natural consequence of the declaration of unconstitutionality. Should our Legislature fail to enact a new valid apportionment statute, there is every likelihood that this unconstitutional Plan A will be given further, possibly permanent, effect by the federal courts. Chapter 773 of the Laws of 1911 empowers this court, in apportionment review proceedings, to grant such "other relief as is proper", that is, such relief as is necessary to effectuate the court's primary determination. In order to give effect to the prior determination herein, it is necessary that this Court fashion some immediate and continuing relief, and the instant applications are appropriate means of securing such relief.

Moreover, the order of this court dated March 24, 1965 (Levy, J.) expressly recites that this court retains jurisdiction of the captioned proceedings,

> "* * * for the purpose of * * * conducting such further proceedings as any party may request or as may be appropriate in the light of further proceedings in these proceedings or in *WMCA Inc.* v. *Lomenzo,* including (but without limitation) applications for injunctive or other relief as may be appropriate to give effect to this judgment or as justice may require."

The instant applications fall squarely within this reservation of jurisdiction.

Respondents next argue that even if this proceeding is properly before the court, the requested relief should be denied, first, because the same relief was sought in *Glinski* v. *Lomenzo, supra,* and found to be inappropriate and second, because both our State Constitution and our Court of Appeals require that reapportionment be left to the Legislature.

It would appear unwise to attempt to rely in any way upon *Glinski* v. *Lomenzo, supra.* The Court of Appeals enjoined the holding of the 1965 election, and three judges opinioned that until the Legislature had an opportunity to formulate a valid plan the present legislators would continue to sit under a system of weighted voting. It is with this relief in mind that we must view the court's affirmance of the dismissal of one cause of action calling for the appointment of a Special Master to promulgate a new apportionment plan for 1966. The three-judge District Court has now frustrated that decision by ordering the November 1965 election to be held pursuant to Plan A. We cannot know how the court might have treated the request for a Special Master if squarely faced with federal judicial intervention, and this court will not join respondents in speculating.

The present intervenors seek a reference pursuant to Article 43 of the CPLR. That article would seem to be inapposite since it concerns itself only with the powers to be given, and procedures to be followed by referees. It is CPLR 4001 which invests the court with whatever power it possesses to appoint referees in the ordinary course of events.

It may well be that no precedent exists for the appointment of a special referee, or panel of referees, or jury of experts, or advisory commission, for the purposes herein intended. However, we have been presented with an extraordinary situation, a constitutional crisis, which requires extraordinary actions if the sovereignty of this State is to be preserved. "* * * [I]f we can find no precedent we must establish one. The court should be resourceful in fashioning a remedy commensurate with a complex situation." (*White* v. *Anderson,* 394 P. 2d 333, 338.) [It is worthy of mention that respondents raised no objection to the pro-

posed use of a referee or Special Master by the District Court and, indeed, argue here that the likelihood of such appointment should deter this court from acting.]

Respondents are correct in stating that the judiciary of this State has traditionally maintained a "hands off" attitude with regard to reapportionment. Our courts have held that even where the Legislature fails to act, it is not the province of our courts to undertake this essentially political function (see, *Burns* v. *Flynn,* 1935, 155 Misc. 2d 742, aff'd 245 App. Div. 799, aff'd 268 N. Y. 601). In the affirmance of the original proceeding herein (*Matter of Orans,* 15 N. Y. 2d 339), the Court of Appeals again affirmed the proposition that redistricting and reapportionment are matters for the Legislature. I agree that the primary responsibility remains with the Legislature. I reject the suggestion of petitioners that the members of our Legislature are so immersed in partisan political considerations as to be morally and intellectually incapable of fulfilling the oath to support and defend *both* the Federal Constitution and the Constitution of the State of New York. I reject the pre-judgment of our present legislative leaders, intervenors herein, that neither the present Legislature in Special Session nor the 1966 Legislature in Regular Session is likely to formulate any acceptable reapportionment plan although squarely faced with the duty of doing so. I also reject the suggestion of respondents that we just give up and throw ourselves on the mercy and wisdom of the federal District Court. I am of the view that reapportionment is a function which can be *best* accomplished by the Legislature. The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information, including existing committees on reapportionment, the expertise its members have so

recently acquired in the task of redistricting, and other factors inherent in the legislative process make it the most appropriate body for reapportionment (*Accord; Butcher* v. *Bloom,* 415 Pa. 438, 203 A. 2d 556 (1964)). Consequently, whatever steps are taken by the court, our Legislature must and shall be given a further opportunity to enact a constitutionally valid reapportionment plan. (see e.g., *Maryland Committee* v. *Tawes,* 377 U. S. 656, 676; *Davis* v. *Mann,* 377 U. S. 678, 692-693).

However, having affirmed my faith in the ability of our Legislature to perform its constitutional duty, I cannot close my eyes to the possibility that our Legislature may, nevertheless, fail to seasonably act. The consequences of legislative inaction are unmistakeably clear—judicial intervention and, if necessary, judicial assumption of the legislative task of reapportionment (see, e.g., *Reynolds* v. *Sims,* 377 U. S. 533). We may lament with Mr. Justice Harlan that "* * * it is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States." (dissenting, in *Reynolds* v. *Sims, supra,* at p. 615), but we must face the reality of such interference and its consequences. The District Court in *WMCA, Inc.* v. *Lomenzo* had heretofore acted with commendable restraint. Nevertheless, that Court has now decreed that temporary violence must be done to our State Constitution rather than permit our citizens to endure a malapportioned legislature beyond December 31, 1965. Moreover, when faced with the failure of the Legislature to formulate an apportionment plan which conformed to both federal and state constitutional requirements, by the May 5, 1965 deadline, the federal court unhesitatingly ordered the coming election pursuant to a plan which does further violence to our State Constitution. There is little reason to expect that

our State Constitution will fare any better in respect of the November 1966 election should State inaction force the federal District Court to further intervene. This is so not because of any antipathy towards our state government or its constitution on the part of the federal court (save where our Constitution conflicts with the United States Constitution) but rather because determination of state constitutional standards is generally not a concern of the District Court but is left to the state courts. Illustratively, discrimination in districting based purely on political considerations (i.e., gerrymandering) is violative of our state constitution. Such discrimination has not yet been held to be within the ambit of the Equal Protection Clause of the Fourteenth Amendment. Consequently, it would appear that a federal District Court imposing a reapportionment plan upon a state need not consider the question of gerrymander. Indeed, if it be so advised, the federal court need only give consideration to the mandate that both houses of the Legislature shall be apportioned on the basis of population, and disregard all else. It appeared uncertain from the initial line of reapportionment cases decided on June 15, 1964, (see, e.g. *Reynolds* v. *Sims*, 377 U. S. 533), whether the Supreme Court had delegated the task of supervising State reapportionment exclusively to the local District Courts or whether State courts were also empowered to control reapportionment. Respondents have proceeded in this action and in *WMCA, Inc.* v. *Lomenzo* as if they believed that the Federal court had exclusive power over reapportionment. Even the Court of Appeals in its prior opinion herein (15 N. Y. 2d 339) appears to suggest that the judiciary defers to the Legislature on questions of reapportionment not merely because that body is best equipped

for the task, but because the traditional notion that the judiciary lacks the power to supervise reapportionment still prevails. However, all uncertainty as to the State court's power to act has now been dispelled,

> "• • • The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged. *Maryland Committee* v. *Tawes,* 377 U. S. 656, 12 L. Ed. 2d 595, 607, 84 S. Ct. 1442 (1964); *Scranton* v. *Drew,* 379 U. S. 40, 13 L. Ed. 2d 107, 85 S. Ct. 207 (1963); citing *Butcher* v. *Bloom,* 415 Pa. 438, 203 A. 2d 556 (1964); *Jackson* v. *Bodine,* 43 N. J. 453, 205 A. 2d 713, 724 (1964). See also *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S. W. 2d 40 (1956), and discussion thereof in *Baker* v. *Carr,* 369 U. S. 186, 235-236, 7 L. Ed. 2d 663, 696, 82 S. Ct. 691 (1962)." *Scott* v. *Germano,* 381 U. S. 407 (June 1, 1965).

In *Scott* v. *Germano,* the United States Supreme Court compelled the three-judge District Court to "stay its hand" since the State Court (Illinois) has now stepped into the picture and has assumed supervision of the problem. It is interesting that Mr. Justice Harlan, in denying a stay from the most recent order in *WMCA, Inc.* v. *Lomenzo,* emphasized the Court's preference for State court action. He stated that the Supreme Court

> "• • • has repeatedly encouraged the state courts to fashion appropriate relief in reapportionment cases, even after a federal court has itself entered an order" (citing cases) U. S. , Reported in The New York Times, July 17, 1965.

This last stated preference for State court action "even after a federal court has itself entered an order", is this court's answer to respondent's final argument (endorsed by the minority in *Glinski v. Lomenzo, supra*) that this court should defer to the District Court because it first obtained jurisdiction over the dispute. Whatever apportionment plan is adopted for the November 1966 election must eventually be submitted to the three-judge District Court to determine the plan's conformity to federal constitutional standards. However, the question remains, shall the State court enter the picture, commence supervision of reapportionment and thus incline the Federal court to stay its hand until the sole issue remaining is the federal question of compliance with the one-man, one-vote mandate?

Indeed, the basic question presented to this court is not whether there shall be judicial intervention in the event of legislative inaction or impotence. Judicial intervention is a foregone conclusion in that unfortunate event. The question to be decided is whether immediate and direct supervision shall be assumed by the State courts or whether the Federal court shall be obliged to again fill the void created by State inaction. Our Court of Appeals has already dictated the choice. "To turn the whole thing over to the Federal courts would be an abdication of the State's sovereignty." (*Matter of Orans*, 15 N. Y. 2d 339, 352.)

Having expressed the view that the court shall find the power to appoint a panel of experts, or referees, if that be necessary, and the further view that the present and upcoming Legislature must be given another opportunity to formulate a valid plan before this court will take the drastic action of formulating its own plan of reap-

portionment, it logically follows that I am disposed to defer decision on the employment of a panel of referees, and consequently the selection of individual members of said panel at this time. It has been called to the court's attention that subsequent to oral argument on these applications, the Governor signed into law Chapter 1070 of the Laws of 1965 providing for a June primary in 1966. The primary election is scheduled to be held on June 21, 1966. As a consequence, the deadline for filing a statement of party positions to be filled at such election (Election Law §18) is March 8, 1966. The first day to circulate designating petitions will be April 5, 1966 (Election Law §136[5]). This is also the first day to circulate nominating petitions for delegates to the State Constitutional Convention to be convened in 1967 (Chap. 371, Laws of 1965). The court is also mindful of the fact that any reapportionment plan it passes upon must thereafter be submitted to the three-judge District Court for approval prior to its implementation.

Considering all of these factors the court determines that it must at this time assume a supervisory role in reapportionment. However reluctantly, this court must impose deadlines upon the Legislature, and in the event of legislative inaction, this court must be prepared to insure that the November 1966 election and the subsequent Constitutional Convention are had pursuant to a redistricting and reapportionment plan which is in conformity with the New York State Constitution as well as the Federal Constitution. Therefore, the intervenors' motion is granted as follows: The court decrees that the regularly scheduled November 1966 election for a normal two-year term shall be held under a plan to reapportion the Senate and Assembly of this State, which complies with the Fourteenth Amendment of the United States Constitution and with all

applicable provisions of the New York State Constitution not in conflict with the United States Constitution. Respondents shall submit such plan for this court's approval on or before February 1, 1966. Upon the failure of respondents to submit such a plan, this court shall undertake the formulation of a reapportionment plan which shall, with federal District Court approval, govern the November 1966 election of members of the New York Legislature. The finally approved plan shall also form the basis for any primary contests to nominate candidates for the Legislature, for the nomination of delegates to the Constitutional Convention and for any special election to fill vacancies prior to December 31, 1968. The court may upon its own motion, at any time, appoint an appropriate number of referees, or jury of experts to assist in the formulation of a comprehensive reapportionment plan as aforesaid, should the court determine that the Legislature and the respondents herein are not proceeding with reasonable diligence so as to permit completion of a valid plan by February 1, 1966. The court also reserves decision as to whether or not it shall, in all events, appoint such referees or experts to assist the court in determining whether such plan or plans as are submitted by respondents are in conformity with constitutional requirements. Settle order.

Dated: August 24th, 1965.

GERALD P. CULKIN
J. S. C.

END